

REMARKS

The Office Action mailed May 28, 2008 has been carefully reviewed and the following remarks have been made in response.

Claims 1, 4-13, 15, 16, 23-55 and 57-61 are pending in this application. Claims 1, 4-13, 15, 16, 23-55 and 57-61 stand rejected. Claims 1, 36, 47 and 61 are amended herein. Claims 2, 3, 14, 17-22 and 56 have been canceled.

Section 103 Rejection of Claims 1, 4-10 and 12

The rejection of Claims 1, 4-10 and 12 under 35 U.S.C. § 103 as being unpatentable over U.S. Patent No. 6,468,222 to Mault et al. (hereinafter referred to as “Mault”) in view of U.S. Patent No. 6,319,199 to Sheehan et al. (hereinafter referred to as “Sheehan”) and U.S. Patent No. 4,233,842 to Raemer et al. (hereinafter referred to as “Raemer”) is respectfully traversed.

Claim 1, as amended herein, recites a breath testing device housing comprising “a base to be gripped by an operator and having a front edge and an opposite back edge; a display oriented on the back edge of the base and aligned with an operator’s direct line of view while gripping said base; a mouthpiece interface for interfacing with a removable mouthpiece, said mouthpiece interface oriented with respect to said base such that when the operator stands in front of the subject and a subject blows into the mouthpiece, said display is not in the direct line of view of the subject; the mouthpiece interface comprising a channel sized to receive the mouthpiece therein, the mouthpiece configured to be pivotally coupled in one orientation within the mouthpiece interface; a manual sample button located on the front edge of said base opposite the display; and an alcohol sensor fluidly connected to the mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.”

None of Mault, Sheehan or Raemer, considered alone or in combination, describes or suggests a breath testing device housing as is recited in Claim 1. More specifically, none of Mault, Sheehan or Raemer, considered alone or in combination, describes nor suggests a breath testing device housing that includes a mouthpiece interface for interfacing with a removable mouthpiece, wherein the mouthpiece interface includes a channel sized to receive

a mouthpiece therein, and wherein the mouthpiece is configured to be pivotally coupled in one orientation within the mouthpiece interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that "[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel." *See* Raemer, Column 6, lines 54-57. Accordingly, for at least the reasons set forth above, Claim 1 is submitted to be patentable over Mault in view of Sheehan and further in view of Raemer.

The United States Supreme Court has recently held that obviousness rejections must be supported with "articulated reasoning with some rational underpinning to support the conclusion of obviousness." *See KSR International Co. v. Teleflex, Inc.*, slip Opinion at page 14. The present rejection does not meet this standard as it reflects no articulate reasoning why the claims are believed to be obvious, but rather is merely stated in the form of a conclusion of obviousness.

Moreover, each and every limitation of the claim must be described or suggested by the prior art or have been obvious based on the knowledge of those of ordinary skill in the art. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). No combination of Mault, Sheehan and Raemer disclose a breath testing device housing that includes a mouthpiece interface for interfacing with a removable mouthpiece, wherein the mouthpiece interface includes a channel sized to receive a mouthpiece therein, and wherein the mouthpiece is configured to pivotally couple within the mouthpiece interface. It would NOT have been obvious to modify Mault to include such an interface and mouthpiece combination in light of Sheehan and Raemer, as Sheehan is directed to a digital otoscopic camera for collecting, storing and exporting images of a subject's eardrum, and Raemer is merely recited for describing a data collection method that may be implemented to determine blood alcohol content of a subject.

Claims 4-10 and 12 depend from independent Claim 1. When the recitations of Claims 4-10 and 12 are considered in combination with the recitations of Claim 1, Applicants submit that dependent Claims 4-10 and 12 likewise are patentable over Mault in view of Sheehan and further in view of Raemer.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claims 1, 4-10 and 12 be withdrawn.

Section 103 Rejection of Claim 11

The rejection of Claim 11 under 35 U.S.C. § 103 as being unpatentable over Mault in view of Sheehan and Raemer and in further view of U.S. Patent No. 5,291,898 to Wolf (hereinafter referred to as “Wolf”) is respectfully traversed.

Claim 11 depends from Claim 1 which recites a breath testing device housing comprising “a base to be gripped by an operator and having a front edge and an opposite back edge; a display oriented on the back edge of the base and aligned with an operator's direct line of view while gripping said base; a mouthpiece interface for interfacing with a removable mouthpiece, said mouthpiece interface oriented with respect to said base such that when the operator stands in front of the subject and a subject blows into the mouthpiece, said display is not in the direct line of view of the subject; the mouthpiece interface comprising a channel sized to receive the mouthpiece therein, the mouthpiece configured to be pivotally coupled in one orientation within the mouthpiece interface; a manual sample button located on the front edge of said base opposite the display; and an alcohol sensor fluidly connected to the mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.”

None of Mault, Sheehan, Raemer and Wolf, considered alone or in combination, describes or suggests a breath testing device housing as is recited in Claim 1. More specifically, none of Mault, Sheehan, Raemer and Wolf, considered alone or in combination, describes nor suggests a breath testing device housing that includes a mouthpiece interface for interfacing with a removable mouthpiece, wherein the mouthpiece interface includes a

channel sized to receive a mouthpiece therein, and wherein the mouthpiece is configured to be pivotally coupled in one orientation within the mouthpiece interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that "[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel." *See* Raemer, Column 6, lines 54-57. Similarly Wolf is merely recited for describing a blood alcohol content measuring device. Accordingly, for at least the reasons set forth above, Claim 1 is submitted to be patentable over Mault in view of Sheehan and Raemer further in view of Wolf.

Claim 11 depends from independent Claim 1. When the recitations of Claim 11 are considered in combination with the recitations of Claim 1, Applicants submit that dependent Claim 11 likewise is patentable over Mault in view of Sheehan and Raemer further in view of Wolf.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claim 11 be withdrawn.

Section 103 Rejection of Claims 13, 15 and 16

The rejection of Claims 13, 15 and 16 under 35 U.S.C. § 103 as being unpatentable over U.S. Patent No. 4,274,425 to Lutz et al. (hereinafter referred to as "Lutz") in view of Mault is respectfully traversed.

Claim 13 recites a mouthpiece for a breath testing device, wherein the mouthpiece comprises "a body comprising a first end, a second end, said first end being open so that a subject can blow air into said mouthpiece, said second end being closed, said mouthpiece further comprising at least one port for channeling air blown into said mouthpiece into the breath testing device, a display, and a discard breath outlet oriented such that discard breath is not directed into the device or at an operator of the breath testing device during testing when

the operator views the display, said mouthpiece having a cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape.”

Neither Lutz nor Mault, considered alone or in combination, describes or suggests a mouthpiece for a breath testing device as is recited in Claim 13. More specifically, neither Lutz nor Mault, considered alone or in combination, describes nor suggests a mouthpiece that includes a discard breath outlet oriented such that discard breath is not directed into the device or at an operator of the breath testing device during testing when the operator views the display, and wherein the mouthpiece includes either a D-shaped or a V-shaped cross-section. Accordingly, for at least the reasons set forth above, Claim 13 is submitted to be patentable over Lutz in view of Mault.

Claims 15 and 16 depend from independent Claim 13. When the recitations of Claims 15 and 16 are considered in combination with the recitations of Claim 13, Applicants submit that dependent Claims 15 and 16 likewise are patentable over Lutz in view of Mault.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claims 13, 15 and 16 be withdrawn.

Section 103 Rejection of Claims 23, 24, 26-32, 34, 36-42, 44, 45, 47, 48, 50-53 and 61

The rejection of Claims 23, 24, 26-32, 34, 36-42, 44, 45, 47, 48, 50-53 and 61 under 35 U.S.C. § 103 as being unpatentable over Mault in view of Raemer is respectfully traversed.

Claim 23 recites a breath tester housing assembly comprising “a housing comprising a base, a display, and a mouthpiece interface, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base; and a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising a body comprising at least one substantially planar surface, the mouthpiece interface including a stop for positively locating the mouthpiece, the mouthpiece being placed against the stop in a testing position; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface,

the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.”

Neither Mault nor Raemer, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 23. More specifically, neither Mault nor Raemer, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to a mouthpiece interface, and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Accordingly, for at least the reasons set forth above, Claim 23 is submitted to be patentable over Mault in view of Raemer.

Claims 24, 26-32 and 34 depend from independent Claim 23. When the recitations of Claims 24, 26-32 and 34 are considered in combination with the recitations of Claim 23, Applicants submit that dependent Claims 24, 26-32 and 34 likewise are patentable over Mault in view of Raemer.

Claim 36 recites a breath tester housing assembly comprising “a housing comprising a base and a display, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base and while the operator stands in front of the subject in a sideways stance; and a mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing, said mouthpiece configured to be pivotally coupled in one orientation within said housing; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.”

Neither Mault nor Raemer, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 36. More specifically, neither Mault nor Raemer, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to the housing assembly and configured to extend obliquely from the housing assembly, wherein the mouthpiece is configured to be pivotally coupled in one orientation within the housing assembly.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Accordingly, for at least the reasons set forth above, Claim 36 is submitted to be patentable over Mault in view of Raemer.

Claims 37-42, 44 and 45 depend from independent Claim 36. When the recitations of Claims 37-42, 44 and 45 are considered in combination with the recitations of Claim 36, Applicants submit that dependent Claims 37-42, 44 and 45 likewise are patentable over Mault in view of Raemer.

Claim 47 recites a breath testing device mouthpiece, wherein the mouthpiece comprises “a first end, a second end, and a body extending therebetween, a portion of said body having a selected cross-sectional shape, said selected cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape, said body further comprising a passageway extending through said body from said first end towards said second end, said passageway for channeling air blown into said mouthpiece into the breath testing device, said mouthpiece configured to pivotally couple in one orientation within a breath testing device interface.”

Neither Mault nor Raemer, considered alone or in combination, describes or suggests a breath testing device mouthpiece as is recited in Claim 47. More specifically, neither Mault nor Raemer, considered alone or in combination, describes nor suggests a breath testing

device mouthpiece that includes a mouthpiece configured to be pivotally coupled in one orientation within a breath testing device interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Accordingly, for at least the reasons set forth above, Claim 47 is submitted to be patentable over Mault in view of Raemer.

Claims 48 and 50-53 depend from independent Claim 47. When the recitations of Claims 48 and 50-53 are considered in combination with the recitations of Claim 47, Applicants submit that dependent Claims 48 and 50-53 likewise are patentable over Mault in view of Raemer.

Claim 61 recites a breath testing device housing comprising “a base to be gripped by either hand of an operator and having a front edge and an opposite back edge; a display oriented on the back edge and aligned with an operator's direct line of view while gripping the base; a removable mouthpiece extending away from the display, the mouthpiece including at least one port for channeling air blown into the mouthpiece into the breath testing device and a discard breath outlet oriented such that discard breath is not directed at an operator of the breath testing device during testing when the operator views the display; a mouthpiece interface for receiving the removable mouthpiece, said mouthpiece configured to pivotally couple in one orientation within a breath testing device interface, the mouthpiece interface and mouthpiece oriented with respect to the base such that, when the operator holds the base in either hand and stands in front of the subject, and a subject blows into the mouthpiece, the display is not in the direct line of view of the subject; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.”

Neither Mault nor Raemer, considered alone or in combination, describes or suggests a breath testing device housing as is recited in Claim 61. More specifically, neither Mault nor Raemer, considered alone or in combination, describes nor suggests a breath testing device housing that includes a mouthpiece configured to be pivotally coupled in one orientation within a breath testing device housing.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Accordingly, for at least the reasons set forth above, Claim 61 is submitted to be patentable over Mault in view of Raemer.

Moreover, the United States Supreme Court has recently held that obviousness rejections must be supported with “articulated reasoning with some rational underpinning to support the conclusion of obviousness.” *See KSR International Co. v. Teleflex, Inc.*, slip Opinion at page 14. The present rejection does not meet this standard as it reflects no articulate reasoning why the claims are believed to be obvious, but rather is merely stated in the form of a conclusion of obviousness.

Additionally, each and every limitation of the claim must be described or suggested by the prior art or have been obvious based on the knowledge of those of ordinary skill in the art. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). No combination of Mault and Raemer disclose a breath testing device housing that includes a mouthpiece interface for interfacing with a removable mouthpiece, wherein the mouthpiece interface includes a channel sized to receive a mouthpiece therein, and wherein the mouthpiece is configured to pivotally couple within the mouthpiece interface. It would NOT have been obvious to modify Mault to include such an interface and mouthpiece combination in light of Sheehan and Raemer., as Raemer is merely recited for describing a data collection method that may be implemented to determine blood alcohol content of a subject.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claims 23, 24, 26-32, 34, 36-42, 44, 45, 47, 48, 50-53 and 61 be withdrawn.

Section 103 Rejection of Claims 25 and 43

The rejection of Claims 25 and 43 under 35 U.S.C. § 103 as being unpatentable over Mault in view of Raemer and further in view of Sheehan is respectfully traversed.

Claim 25 depends from Claim 23 which recites a breath tester housing assembly comprising “a housing comprising a base, a display, and a mouthpiece interface, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base; and a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising a body comprising at least one substantially planar surface, the mouthpiece interface including a stop for positively locating the mouthpiece, the mouthpiece being placed against the stop in a testing position; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.”

None of Mault, Raemer or Sheehan, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 23. More specifically, none of Mault, Raemer or Sheehan, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to a mouthpiece interface, wherein mouthpiece interface includes a channel sized to receive the mouthpiece therein, and wherein the mouthpiece is configured to pivotally couple within the mouthpiece interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Moreover, Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements

of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Accordingly, for at least the reasons set forth above, Claim 23 is submitted to be patentable over Mault in view of Raemer and further in view of Sheehan.

Claim 25 depends from independent Claim 23. When the recitations of Claim 25 are considered in combination with the recitations of Claim 23, Applicants submit that dependent Claim 25 likewise is patentable over Mault in view of Raemer and further in view of Sheehan.

Claim 43 depends from Claim 36, which recites a breath tester housing assembly comprising “a housing comprising a base and a display, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base and while the operator stands in front of the subject in a sideways stance; and a mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing, said mouthpiece configured to be pivotally coupled within said housing; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.”

None of Mault, Raemer nor Sheehan, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 36. More specifically, None of Mault, Raemer nor Sheehan, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing, said mouthpiece configured to be pivotally coupled within said housing.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Moreover, Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57.

Accordingly, for at least the reasons set forth above, Claim 36 is submitted to be patentable over Mault in view of Raemer and further in view of Sheehan.

Claim 43 depends from independent Claim 36. When the recitations of Claim 43 are considered in combination with the recitations of Claim 36, Applicants submit that dependent Claim 43 likewise is patentable over Mault in view of Raemer and further in view of Sheehan.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claims 25 and 43 be withdrawn.

Section 103 Rejection of Claim 33

The rejection of Claim 33 under 35 U.S.C. § 103 as being unpatentable over Mault in view of Raemer and further in view of Wolf is respectfully traversed.

Claim 33 depends from Claim 23, which recites a breath tester housing assembly comprising “a housing comprising a base, a display, and a mouthpiece interface, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base; and a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece interface comprising a channel sized to receive said mouthpiece therein, said mouthpiece configured to pivotally couple within said mouthpiece interface, said mouthpiece comprising a body comprising at least one substantially planar surface, the mouthpiece interface including a stop for positively locating the mouthpiece, the mouthpiece being placed against the stop in a testing position; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.”

None of Mault, Raemer or Wolf, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 23. More specifically, none of Mault, Raemer or Wolf, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to a mouthpiece interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange. Moreover, Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Similarly, Wolf is merely recited for describing a blood alcohol content measuring device. Accordingly, for at least the reasons set forth above, Claim 23 is submitted to be patentable over Mault in view of Raemer and further in view of Wolf.

Claim 33 depends from independent Claim 23. When the recitations of Claim 33 are considered in combination with the recitations of Claim 23, Applicants submit that dependent Claim 33 likewise is patentable over Mault in view of Raemer and further in view of Wolf.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claim 33 be withdrawn.

Section 103 Rejection of Claims 35, 46 and 49

The rejection of Claims 35, 46 and 49 under 35 U.S.C. § 103 as being unpatentable over Mault in view of Raemer and further in view of Lutz is respectfully traversed.

Claim 35 depends from Claim 23, which recites a breath tester housing assembly comprising “a housing comprising a base, a display, and a mouthpiece interface, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base; and a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising a body comprising at least one substantially planar surface, the mouthpiece interface including a stop for positively locating the mouthpiece, the mouthpiece being placed against the stop in a testing position; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.”

None of Mault, Raemer or Lutz, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 23. More specifically, none of Mault, Raemer or Lutz, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to a mouthpiece interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Moreover, Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that "[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel." *See* Raemer, Column 6, lines 54-57. Lutz describes a mouthpiece for a device that the concentration of alcohol from a subject's breath that includes a measuring head that slidably engages the measuring device. Accordingly, for at least the reasons set forth above, Claim 23 is submitted to be patentable over Mault in view of Raemer and further in view of Lutz.

Claim 35 depends from independent Claim 23. When the recitations of Claim 35 are considered in combination with the recitations of Claim 23, Applicants submit that dependent Claim 35 likewise is patentable over Mault in view of Raemer and further in view of Lutz.

Claim 46 depends from Claim 36, which recites a breath tester housing assembly comprising "a housing comprising a base and a display, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base and while the operator stands in front of the subject in a sideways stance; and a mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing, said mouthpiece configured to be pivotally coupled in one orientation within said housing; and an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece."

None of Mault, Raemer or Lutz, considered alone or in combination, describes or suggests a breath tester housing assembly as is recited in Claim 36. More specifically, None of Mault, Raemer or Lutz, considered alone or in combination, describes nor suggests a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to the housing assembly and configured to extend obliquely from the housing assembly, wherein the mouthpiece is configured to be pivotally coupled in one orientation within the housing assembly.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Moreover, Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that "[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel." *See* Raemer, Column 6, lines 54-57. Lutz describes a mouthpiece for a device that the concentration of alcohol from a subject's breath that includes a measuring head that slidably engages the measuring device. Accordingly, for at least the reasons set forth above, Claim 36 is submitted to be patentable over Mault in view of Raemer and further in view of Lutz.

Claim 46 depends from independent Claim 36. When the recitations of Claim 46 are considered in combination with the recitations of Claim 36, Applicants submit that dependent Claim 46 likewise is patentable over Mault in view of Raemer and further in view of Lutz.

Claim 49 depends from Claim 47, which recites a breath testing device mouthpiece, wherein the mouthpiece comprises "a first end, a second end, and a body extending therebetween, a portion of said body having a selected cross-sectional shape, said selected cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape, said body further comprising a passageway extending through said body from said first end towards said second end, said passageway for channeling air blown into said mouthpiece into the breath testing device, said mouthpiece configured to pivotally couple in one orientation within a breath testing device interface."

None of Mault, Raemer nor Lutz, considered alone or in combination, describes or suggests a breath testing device mouthpiece as is recited in Claim 47. More specifically, none of Mault, Raemer nor Lutz, considered alone or in combination, describes nor suggests a breath testing device mouthpiece that includes a mouthpiece configured to be pivotally coupled in one orientation within a breath testing device interface.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57. Lutz describes a mouthpiece for a device that the concentration of alcohol from a subject’s breath that includes a measuring head that slidably engages the measuring device. Accordingly, for at least the reasons set forth above, Claim 47 is submitted to be patentable over Mault in view of Raemer and further in view of Lutz.

Claim 49 depends from independent Claim 47. When the recitations of Claim 49 are considered in combination with the recitations of Claim 47, Applicants submit that dependent Claim 49 likewise is patentable over Mault in view of Raemer and further in view of Lutz.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claims 35, 46 and 49 be withdrawn.

Section 103 Rejection of Claims 54, 55 and 57-60

The rejection of Claims 54, 55 and 57-60 under 35 U.S.C. § 103 as being unpatentable over Mault in view of Lutz is respectfully traversed.

Claim 54 recites a mouthpiece for a breath testing device, wherein the mouthpiece comprises “a body extending between a first end and a second end, said body comprising a first body portion, a second body portion, and a passageway defined at least partially within said first and second body portions, said first body portion extending from said first end to said second body portion, said second body portion extending from said second end to said

first body portion, said passageway substantially concentrically aligned with respect to said body and extending from said first end towards said second end for channeling air blown into said first end into the breath tester, at least one of said first and second body portions comprises at least one port extending between an external surface of said body and said passageway, said at least one port being defined within said first body portion for channeling discard breath air from said mouthpiece during testing, said at least one port is oriented with respect to said mouthpiece such that discard breath is not directed towards an operator of the breath testing device during testing.”

Neither Mault nor Lutz, considered alone or in combination, describes or suggests a mouthpiece for a breath testing device as is recited in Claim 54. More specifically, neither Mault nor Lutz, considered alone or in combination, describes nor suggests a mouthpiece that includes at least one port being for use in channeling discard breath air from the mouthpiece during testing, wherein the port is oriented with respect to the mouthpiece such that discard breath is not directed towards an operator of the breath testing device during testing.

Lutz describes a mouthpiece for a device that the concentration of alcohol from a subject’s breath that includes a measuring head that slidably engages the measuring device. Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange. Accordingly, for at least the reasons set forth above, Claim 13 is submitted to be patentable over Mault in view of Lutz.

Claims 55 and 57-60 depend from independent Claim 54. When the recitations of Claims 55 and 57-60 are considered in combination with the recitations of Claim 54, Applicants submit that dependent Claims 55 and 57-60 likewise are patentable over Mault in view of Lutz.

For at least the reasons set forth above, Applicants respectfully request that the Section 103 rejection of Claims 54, 55 and 57-60 be withdrawn.

Double Patenting Rejection of Claims 13, 15, 16, 23-27, 47-55 and 57-61

The rejection of Claims 13, 15, 16, 23-27, 47-55 and 57-61 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over Claims 1-7 and 11-29 of U.S. Patent Application No. 11/089,655 to Forrester, Jr. is respectfully traversed.

Applicants note this rejection is in fact a provisional obviousness-type double patenting rejection since U.S. Patent Application No. 11/059,655 has not yet issued as a patent. Applicants will address the merits of this rejection, as appropriate, if the listed application issues as a patent before the application at hand.

CONCLUSION

In view of the foregoing remarks, all the claims now in this application are believed to be in condition for allowance. Reconsideration and favorable action is respectfully solicited. The undersigned respectfully requests a telephone call from the Examiner if a call might expedite the allowance of the application.

Applicants do not believe any fees are due in connection with this amendment. However, the Commissioner is hereby authorized to charge any fees which may be required to Deposit Account No. 012384 in the name of ARMSTRONG TEASDALE LLP.

Respectfully submitted,

/Michael G. Munsell/

Michael G. Munsell
Registration No. 43,820
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070